

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI
ELRC CAUSE NO. 634 OF 2019

BANKING INSURANCE FINANCE UNION (KENYA).....CLAIMANT
VERSUS
GUARDIAN BANK LIMITED.....
.....RESPONDENT

JUDGMENT

The suit is premised on the amended memorandum of claim dated 25/9/2019 in which the Claimant prays for the following reliefs: -

1. That the Honourable Court to order for the payment of all salaries and allowances (lost earnings) grievant has lost of Kshs. 13,941,180.00 (thirteen million nine hundred forty-one thousand one hundred and eighty) for the five (5) years remaining to retirement.
2. That the Claimant also pray for twelve (12) months' salaries of Kshs. 2,788,236.00 (two million seven hundred and eighty thousand two hundred and thirty-six) as compensation for having suffered unfair and unlawful loss of employment.
3. That the Claimant also pray for the payment of 140 leave days of Kshs. 1,069,640.00 (one million, six nine thousand, four hundred sixty only) which the grievant could have earned for the five years remaining to retirement.
4. That the Claimant further pray for leave allowance of Kshs. 57,500.00 (fifty-seven thousand five hundred only) which the grievant was

entitled to for the five remaining years to retirement in line with clause AB 17 of the parties CBA provisions.

5. That the Claimant further pray for the payment of twelve (12) leave days of Kshs. 91,668 which were illegally deducted from her annual leave days of 2019, while on a compassionate leave attending to her mother's funeral.
6. That the Claimant's finally pray that the terminal benefits of Kshs. 951,190.00 which were illegally remitted to the Sacco society by the Respondent be recalled and refunded to the grievant so that she may make her own arrangements to service her loans with the Sacco society.
7. Costs of the suit

The grievant testified as CW1 and adopted a witness statement of the Claimant attached to the amended memorandum of claim dated 25/9/2019.

CW1, the grievant/Rose Nyambura Gichohi testified that she was employed by the defunct First National Finance Bank (K) Limited on 1/11/1996 as a clerical staff.

That on 20/2/2001 the First National Finance bank (K) Ltd was acquired by the Respondent, Guardian Bank/Kenya Ltd and the grievant entered into an employment contract with the Respondent bank.

That the letter of appointment between the Claimant and the first National Finance Bank (K) Ltd provided for a retirement age of 60 years.

The grievant testified that she was employed by the Respondent on the terms and condition of service of the 1st employer, the National Finance Bank (K). Ltd. That the letter stated;

“that as a special case, your services are continued with us on the same terms and conditions recently applicable to the staff of Guardian Bank Ltd.”

That the Respondent has a Human Resource Policy which states that employees may be retained in employment up to the age of 70 years.

That the Respondent issued a notice dated 1st June 2019 to the grievant, informing her that she would retire from employment upon attaining fifty-five (55) years of age.

That some of the employees of the Respondent work in the bank past the 55 years age and retire at the age of 70 years.

That employment policy and practice should promote equal opportunity in employment in order to eliminate discrimination in employment. That all employees are equal before the law and should be treated equally.

That the industrial practice is that all employees retire from employment at the age of sixty (60) years.

That the bank’s policy also states that when an employee leaves employment after five (5) years continuous service then he/he should be paid 15 days salary for each completed year of service.

That when CW1 left the bank, she had served the employer for 22 years and was never paid for the five years of service as required by the Respondent's own policy.

CW1 said she was only paid gratuity of Kshs. 951,190.00 an amount which was unlawfully and without consent debited from CW1's account and paid to Kenya Bankers Sacco to clear a loan which CW1 had with the Sacco.

That the Sacco rules state that when a member leaves employment and a loan is still outstanding, then the same should be recovered from the member's shares and guarantors.

That after twenty-two (22) years of service with the bank, CW1 states that she left the bank with no take home benefits.

That CW1 was mistreated and deserves the reliefs sought.

The Claimant produced the memorandum of agreement between The Kenya Bankers Association and The Banking Insurance and Finance Union (Kenya) dated 4th October 2000 which CW1 states was applicable to her as a unionisable member. The Claimant also relied on a Collective Bargaining Agreement (CBA) between the Bankers Association and Banking Insurance and Finance Union Kenya dated 10/9/2019 which CW1 states was applicable to her with respect to the retirement age and payment of retirement benefits for a unionisable employee or union member who had served a period of 22 years as herself.

The Claimant also produced the Respondent's Agency fees remittance schedule for the month of October 2019 which shows, Gichohi Rose Nyambura was deducted the monthly agency fees by the Respondent in the sum of Kshs. 600.00. The Claimant also produced schedule of remittance for COTU by the Respondent which shows that the Respondent remitted to COTU affiliation fees of Kshs. 150.00 on behalf of CW1 for the month of October 2019.

Similar remittances of agency fees by the Respondent of Kshs. 600.00 for the month of June 2019 on behalf of CW1 were produced before court and Kshs. 150.00 to COTU.

The Claimant also produced the employment contract between CW1 and First National Finance Bank (K) Ltd dated 21st November 1996 which provided under clause 12 that;

“The retirement age for employees of the Bank other than those employed under any contract, shall be 60 years.”

The Claimant produced a letter dated 20th February 2001 written to CW1 by the Respondent as follows: -

“RE: Your employment in the Bank:

We refer to your letter of appointment dated 1st November 1996 issued by The First National Finance Bank Ltd. As you are well aware that Guardian Bank Limited in order to protect the interest of the depositors and employees came to the help of the First National Finance Bank Limited and took over the same. As a special case your services are continued with us on the same terms and conditions

**presently applicable to the staff of Guardian Bank (K) Limited/
Collective Bargaining Agreement.**

If you prefer to continue to work with this institution on the said terms and conditions, please return the duplicate signed as a token of your acceptance

Yours faithfully

Guardian Bank Ltd

N. SABESAN

GENERAL MANAGER.” (Emphasis added).

The Claimant produced the Human Resource Policy of the Respondent. The Human Resource Policy Manual provides at clause 23.0 titled “Retirement from the services of the Bank”:

“On attaining the age of 55 years an employee of the bank is to be retired from Bank’s services. However, Human Resource Committee may at its sole discretion re-employ the retiring official of category of senior management – II and above on ‘contract-basis’ on the terms and conditions so determined by the Human Resource Committee. Such contract appointments will be after a gap of one month after retirement. However, the maximum age upon which an employee can be retained in the banking service will be 70 years. The condition of an employee retiring at the age of 70 years may be waived by the Board of Directors...”

The Human Resource Policy manual is dated 25th September 2018.

The Claimant produced the letter of retirement written to CW1 by the Respondent which notified CW1 of the impending retirement in terms of clause 23.0 of the Respondent's Human Resource Policy upon reaching the age of 55 years. The retirement was effective 30th September 2019. The retirement benefits were to be credited to CW1's account with the bank on the last day of the service. The letter is written by N. Sabastian, Chief Executive Officer and is dated 1st June 2019.

The grievant was born on 22nd September 1964 as per a copy of birth certificate produced before court. The Claimant produced a pay slip of CW1 for the month of October 2019 which shows her gross salary to be Kshs. 232,353.00 which shows the deduction by the Respondent of agency fees of Kshs. 600.00 and COTU affiliation fees of Kshs. 150.00 Sacco deduction of the Kshs. 64,792.00.

The Claimant also relied on the circular by the office of President dated 20/3/2001 which reviewed the retirement age of public servants from age 55 to 60 years.

The court had by a ruling dated 1st November 2019 declined to stay the retirement of CW1 pending the hearing and determination of the suit. The Claimant prays that the court allows the suit and grant the reliefs sought.

Defence

The Respondent filed an amended memorandum of defence dated 29th March 2023 in which the claim is denied in its totality.

RW1, Joseph Wachira testified in defence of the case. He said he was the Human Resource Manager of the Respondent for the past 15 years. That

he recorded a witness statement dated 11/6/2025 which he adopted as his evidence in chief. RW1 also produced exhibits '1' to '3' in support of the defence, which included an email dated 2/12/2019 in which the Kenya Bankers Sacco, Recoveries Manager communicated to the Respondent that the grievant had an outstanding loan of Kshs. 894,687.00 as at the date which should be settled as at 6/12/2019. The letter from the grievant to the Respondent dated 2/12/2019 confirmed that she had an outstanding loan balance with the Sacco in the sum of Kshs. 829,894.9=85. The grievant stated that her final dues were Kshs. 871,499.00, which was to be credited to the Sacco account and the outstanding balance of Kshs. 41,600.00 will be directly footed by her and her guarantors with whom she was consulting. The 3rd document is the pay slip for the final payment showing amount payed of Kshs. 871,499.00 in respect of her terminal benefits.

RW1 stated that in the ruling of the court, per Radido J. dated 1/11/2019, in which the grievant sought stay of the retirement pending the hearing and determination of this case, the court had confirmed that the retirement of the grievant was proper and in terms of clause 23.0 of the Respondent's Human Resource Policy.

RW1 stated that the Judge in the Ruling dated 1/11/2019 had confirmed that contrary to the allegations by the Claimant, after 20/2/2001 the grievant was offered by the Respondent new terms and conditions of service and therefore the previous terms and conditions of employment agreed between the grievant and First National Finance Bank (K) Limited and in

particular on retirement age of 60 years were no longer applicable to the grievant. That the grievant was therefore lawfully retired at 55 years.

On the claim that the compassionate leave to the Claimant was not taken into account in computation of her final dues, RW1 stated that in terms of clause AB27 in the applicable Collective Bargaining Agreement at page 42 of the Claimant's bundle, the grievant had no absolute right and/or entitlement to compassionate leave and so the fact that she did not fully utilize the same but only used 12 days does not entitle her to payment in respect of untaken compassionate leave.

With regard to the computation of the terminal dues that is set out at page 147 to 148 of the Claimant's bundle, RW1 stated that the grievant accepted the same by signing the document to confirm the same. That the entire amount was credited in the grievant's personal bank account and it was from that account that part of the final dues which were paid were debited and paid in favour of Kenya Bankers Sacco Limited. That the Respondent acted in accordance with a written request in the letter produced by RW1 written by the grievant to the Respondent.

That the claim be dismissed with costs.

DETERMINATION

The parties filed written submissions which the court has carefully considered together with the evidence adduced by CW1 and RW1. The issues emerging for determination are: -

- (i) Whether the grievant's retirement date was in terms of the new agreement with the Respondent at 55 years or in terms of the

previous agreement with the First National Finance Bank (K) Ltd at 60 years.

- (ii) Whether the terminal benefits due to the Claimant were properly tabulated and paid in terms of her new agreement with the Respondent.

With regard to the 1st issue, in the letter of appointment between the grievant and the Respondent which the court has reproduced in full in this judgment, it is patently clear that the terms and conditions of employment under clause 12 of the contract of employment between the grievant and the First National Finance Bank (K) Ltd dated 1st November 1996, to retire upon attaining 60 years of age, were superseded by the new agreement between the grievant and the Respondent. It was expressly stated in the new agreement dated 20th February 2001 that *“As a special case your services are continued with us on the same terms and conditions presently applicable to the staff of Guardian Bank Limited/Collective Bargaining Agreement.”*

From a literal reading of this agreement, the employment of the grievant was continued from the date of employment by the First National Finance Bank (K) Ltd which is 21st November 1996 but on new terms to be found in the Collective Bargaining Agreement between the Claimant Union and the Respondent (Guardian Bank Kenya Ltd) and in the Human Resource Policy Manual of the Respondent and in particular clause 23.0 which has also been produced in full in this judgment and provides that employees of the Respondent were to retire upon attaining 55 years of age.

The clause also provided that any retention of an employee beyond 55 years of age was to be on the basis of a re-employment contract at the sole discretion of the Bank. This re-employment contract was also strictly in respect of employees in the category of senior management II and above. The grievant was not re-employed under such a contract contemplated under clause 23.0. The grievant was therefore properly retired at age 55. The claim lack merit in this respect and is dismissed.

With regard to the 2nd issue of tabulation of retirement benefits due and owing to the grievant from the Respondent, gratuity was calculated from the date of employment with the First National Finance Bank (K) Ltd on 1st November 1996, which meant that the grievant had served a continuous period of 22 years up to the retirement date of 1st November 2019. The respondent however, applied the basic salary earned by the grievant as at 31st July 2018, the date in which the grievant had served her last “completed year of service.” In the sum of Kshs. 206,748.00 leading to a gross gratuity payment maximum of Kshs. 1,240,488.00. The grievant was therefore paid the maximum amount of Kshs. 1,240,488.00.

The relevant clause with regard to the tabulation of terminal gratuity, was clause 9.1 of the Respondent’s Human Resource Manual and the relevant part of the provision reads: -

“Salient features of the scheme are:

- ***Employees who have put in 5 years of continuous service after confirmation will be paid an amount upon leaving the bank’s service, at the rate of 15 days of last drawn salary for each completed year of service counted from the date of joining, with***

such payment subject to a maximum of 6 months last drawn salary. The requirements of 5 years of continuous service and/or maximum 5 months' salary may be varied by the Human Resource Committee on case to case basis based on the performance of the employee during the tenure of service.

- ***The payment to be paid on the last date of service of the employee.***
- ***The payments are subject to deduction of payee at the appropriate rate at the time of scheme/=***

The existing scheme of compensation to be withdrawn upon implementation of the proposed provident fund scheme as approved by the Board.” (Emphasis added)

A literal interpretation of the salient features of the Terminal Benefits Scheme of the Respondent extracted from the above are;

- (i) An employee who had served over 5 years was to receive gratuity calculated at the rate of 15 days of last drawn salary for each completed year of service subject to a maximum of 6 months last drawn salary.
- (ii) The requirement of 5 years of continuous service and/or maximum 6 months' salary may be varied by the HR Committee on case-to-case basis based on the performance of the employee during the tenure of service.
- (iii) Payment is to be paid on the last date of service of the employee.
- (iv) The payments are subject to the deduction of PAYE at the appropriate rate.

In the case of the Claimant her last drawn salary and as is the practice confirmed by our courts in numerous cases is the last paid salary on the date of the separation which in this case was 1st November 2019. As at this date the Claimant earned a gross salary of Kshs. 230,953.00. Purposive reading of clause 9.1 guided by the precedents of this court is that the salary applicable for the calculation of gratuity is the last drawn salary as at the date of separation. In the absence of any provision to the contrary in the HR manual, an interpretation that upholds the right of the employee leaving employment is to be applied and, in this case, the last drawn salary includes the house allowance component since the grievant enjoyed a consolidated gross salary of Kshs. 230,953 as at 1st November 2019 as per the document at page 148 of the Claimant's bundle. The amount payable therefore was $Kshs. 230,953 \times 22 \times \frac{1}{2} \text{ years} = Kshs. 2,540,483.00$ capped at a maximum of six months' salary which is $(230,953 \times 6) = Kshs. 1,385,718.00$. The court finds that the Claimant should have been paid terminal gratuity in the sum of Kshs. 1,385,718 instead of Kshs. 1,240,488.00. A balance of Kshs. 145,230.00 is due and owing to the claimant in terms of clause 9.1. of the HR Manual which had terminal benefits terms more favourable to the grievant and ought to have been applied by the Respondent in computing her terminal benefits.

The transition contract between the grievant and the Respondent expressly incorporated the terms of the Collective Bargaining Agreement (CBA) between the Kenya Bankers Association and the Claimant Union in the Agreement. Therefore, the negotiated terms of the CBA were applicable to the grievant in terms of her contract of employment with the Respondent.

Though the grievant was a unionisable member and her contract of employment with the Respondent incorporated negotiated CBA as part and parcel of her terms and condition of employment, the CBA applicable at the time of her separation did not provide more favourable exit terms compared to those provided in the clause 9.1 of the HR Manual.

With regard to the submission that clause 9.1 unlawfully capped the gratuity payable to a maximum of 6 months' salary in contravention of the Employment Act 2007.

The court notes that the HR Policy Manual was concluded and approved by the Board of Directors at a meeting held on 25th September 2018. Accordingly, any clause, that contravened or provided lesser terms and conditions of service to that provided in the Employment Act 2007 would be superseded by the provisions of the Act.

In this regard the evidence before court is that the Respondent did not have any pension or provident fund scheme in favour of its employees. The only benefit payable to the grievant upon retirement after 22 years of service was the gratuity in terms of clause 9.1 of the HR Policy Manual of the Respondent concluded in the year 2018, one year before her retirement date.

Section 35(5) of the Employment Act 2007 provides;

“(5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked terms of which shall be fixed.

- (6) This section shall not apply where an employee is a member of:
- (a) a registered pension or provident fund scheme under the Retirement Benefits Act;
 - (b) a gratuity or service pay scheme established under a collective agreement;
 - (c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and
 - (d) the National Social Security Fund.

A contextual reading of this section takes the court to section 40(1) (g) where the law provides for gratuity payable in respect of an employee declared redundant as follows: -

“20(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions:

(g) The employer has paid an employee declared redundant severance pay at the rate of not less than fifteen days’ pay for each completed year of service.”

The court finds that clause 9.1 of the HR Manual of the Respondent was crafted to apply to all manner of termination of contract in the organization and the scheme was specifically meant to *“reward employees who choose to remain with the bank for long number of years to be paid at time of them leaving the bank.”*

The capping of the gratuity payable to an employee who has served 22 years in the case of the Claimant negates the letter and spirit of section 35(5) read with section 40(1)(g) of the Employment Act, 2007.

The Respondent calculated the gratuity of the Claimant with effect from 31st July 2018 by which date the HR Policy document of the Respondent before court which was concluded on 25th September 2018 had not come to effect. Clause 3.0 of the HR Policy document provides *inter alia*, that the HR Policy document will apply to all staff of the bank; The effective date “*will be the date when the same is approved by the Board of Directors of the Bank; Exceptions will apply where the bank has entered into a contract with the employee with any specific conditions and any provisions under the “Collective Bargaining Agreement” will prevail over the terms of the document in case of unionized employees.*”

The CBA between the parties adopted the words of clause 40(1)(g) in respect of payment of severance pay. The CBA has no clause on payment of gratuity upon retirement for an employee who has no pension scheme other than the minimal sums payable under NSSF.

The court finds that equity and justice of this case demands that the gratuity payable to the grievant in terms of section 9.1 of the HR Policy because the grievant retired on 1/11/2019 after the HR policy had come to effect is to be calculated using the 15 days salary of the last gross salary paid to the grievant of Kshs. 250,953 multiplied by 22 years completed service as follows; (230,953 x 15 days salary x 22 years) making a total payment of Kshs. 2,540,483.00.

This clause 9.1 is construed in favour of the grievant in the absence of any evidence of the terms of service in the HR Policy Manual that was succeeded by the current one on 25th September 2018 especially in view of the provisions of section 74(1) which mandates an employer to keep a written record of all employees employed by him which record shall contain particulars – **“(a) of a policy statement under section 7(2) where applicable;**

Section 7(2) mandates the employer to draw a contract of employment with all particulars of employment set out under section 10 of the Employment Act 2007.

Section 10(7) provides

“(7) If in any legal proceedings an employer fails to produce a written contract on the written particulars prescribed in the subsection

(1)the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.”

In the present case, the employer has not produced the gratuity terms applicable to the grievant prior to September 2018 referred to in the letter of contract between the grievant and the Respondent dated 20th February 2001

Leave pay

The grievant has proved that the Respondent wrongly counted 12 days, the grievant was given as compassionate leave to attend the funeral of her mother in computing payment in lieu of leave days not paid. Accordingly, the court awards the Claimant 12 days salary in lieu of leave days not

taken in the sum of Kshs. 91,066.00. Leave allowance is not payable where an employee does not actually go on leave but is paid in lieu of leave days not taken. The claim for payment of leave allowance is misconceived and is dismissed.

Discrimination

The Claimant has not proved that the grievant was discriminated upon in respect of the retirement age. The grievant was retired in accordance with the terms and conditions of her employment contract dated 20th February 2001.

Payment of the Sacco loan

The court finds that the grievant consented to the remittance of terminal benefits to offset outstanding Sacco loan by a letter dated 2nd December 2019, written and signed by the hand of the grievant produced before court by RW1. The bind to declare this payment unlawful is misconceived and without merit. Same is dismissed.

In the final analysis judgment is entered in favour of the Claimant/grievant against the Respondent as follows: -


(a) An award of gratuity calculated at 15 days gross salary for each completed year of service ($230,953(x1/2) \times 22$ years) making a total of Kshs. 2,540,483.00 less the amount already paid of Ksh. 1,240,485 Balance payable = **Kshs. 1,299,995.00.**

(b) Payment in lieu of 12 days untaken leave in the sum of **Kshs. 91,668.00.**

Total award Kshs. 1,391,663.00

- (c) Interest at court rates from date of termination being 1/11/2019 till payment in full
- (d) Costs of the suit

Dated at Nairobi this 9th day of February 2026



Mathews Nduma

JUDGE

Dated, signed and delivered in open court at Nairobi this 16th day of February 2026

J. W. KELI

JUDGE

In the presence of:

Mr. Odero for Claimant

Mr. Mutua for Respondent

Mr. Kemboi – Court Assistant